

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

In re: DONNA M. HAYES,) Case No. 12-61487-LYN
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Debtor.)
)
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DONNA M. HAYES,) Adv. No. 12-06067
)
Plaintiff,)
)
v.)
WELLS FARGO HOME MORTGAGE,)
)
Defendant,)
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MEMORANDUM

This matter comes before the court on a complaint by Donna M. Hayes (“the Plaintiff” or “the Debtor”) seeking to avoid a lien arising under a deed of trust in favor of Wells Fargo Home Mortgage, (“Wells Fargo”). Also before the court is the chapter 13 trustee’s objection to the Debtor’s chapter 13 plan.

Jurisdiction

This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(A)&(K). This Court may enter a final order. This memorandum shall constitute the Court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, which is made applicable in this proceeding by Fed. R. Bankr. P. 7052.

Facts

On November 7, 2010, the Debtor filed a Chapter 7 petition in the Eastern District of Virginia. Venue was improper. Wells Fargo was a creditor in that case holding both a first and second deed of trust on the Debtor's residence. On the basis of these claims, Wells Fargo filed two motions for relief from the automatic stay, one based on each of the deeds of trust. The Debtor and her counsel both failed to appear at the first meeting of creditors and also at the rescheduled meeting of creditors. The Debtor was represented by the Vienna Law Group. The case was subsequently dismissed.

On March 7, 2011, the Debtor filed a Chapter 7 petition in the Western District of Virginia. Venue was proper. At that time she had been unemployed for approximately three years and was living on \$1,500.00 per month. The Debtor was again represented by the Vienna Law Group. Counsel was two hours late for the first meeting of creditors. After the first meeting of creditors was conducted, in March of 2011, the Debtor obtained full-time employment.

During this second Chapter 7 case, Wells Fargo again filed two motions for relief from the automatic stay, one based on each of the deeds of trust. In the motions, Wells Fargo asserted that the Debtor was behind \$50,161.18 on the first deed of trust and \$9,460.35 on the second

deed of trust. The Court granted both motions for relief from the stay. On June 17, 2011, the Debtor received a discharge in the second Chapter 7 case and the case was closed.

Thereafter, Wells Fargo attempted to sell the Debtor's residence at auction on three separate occasions. None of the auctions resulted in a sale. Wells Fargo then agreed to modify the debt owed under the first deed of trust. The first deed of trust was approximately \$315,460.00. The Debtor's residence was appraised at \$212,000.00. According to the Debtor, the modification "cured a \$76,000.00 default" for the Debtor.

On June 21, 2012, the Debtor filed another petition initiating the above-styled Chapter 13 case. The Debtor was not represented by Vienna Law Group in this case. No unsecured claims were filed. The Debtor's plan ("the Plan") provided for payments totaling \$3,600.00. The Plan only provided for payments to the Debtor's counsel and the Chapter 13 trustee. The Plan also provided for the avoidance of Wells Fargo's second deed of trust. Wells Fargo and the Debtor have entered into a consensual¹ judgment avoiding the second deed of trust, which is only subject to the approval of this court and the completion of performance under the Debtor's Chapter 13 Plan.

The Debtor scheduled priority tax claims totaling \$2.00 [sic] and did not schedule any general unsecured claims. The Debtor's proposed Plan provides for sixty monthly payments of \$60.00 each. The total payment to creditors under the Plan is \$3,600.00. The only claim filed in this case was filed by the Internal Revenue Service ("IRS"). The IRS, however, subsequently filed an amended claim in the amount of \$0.00. Consequently, there are no priority or general

¹ The proposed judgment refers to itself as "this *Default Judgment Order for Cancellation and Avoidance of the Lien on Plaintiff's Residential Real Estate*". (Emphasis added.) The judgment is not a default judgment.

unsecured claims to be paid under the Plan.

The Chapter 13 trustee objects to the Plan on the grounds that it is filed in bad faith.

Discussion.

This matter comes before the court for consideration of two issues, whether the Debtor may avoid the Defendant's lien and whether the Debtor's Chapter 13 Plan may be confirmed.

I.

The first issue before the court is whether a debtor may avoid a lien in a Chapter 13 bankruptcy case if the value of the collateral is less than all senior liens and if the debtor is not eligible to receive a discharge in the case. In this instance, the lien in question is wholly unsecured. In *In re Helton*, 11-60126 (Bankr. W.D. Va. 2011) this court discussed extensively whether a lien could be avoided in a case under somewhat similar circumstances as that at bar. It was concluded, generally, that a debtor is permitted to avoid a consensual lien on a debtor's residence if the amount of the senior liens are greater than the value of the residence. While the trustee has filed an answer and objection to the Debtor's complaint seeking to avoid Wells Fargo's lien arising from its second deed of trust, his argument concern whether the petition was filed in good faith, not whether the lien may be avoided. For that reason and for the reasons stated in *Helton*, it is concluded that the Debtor may avoid Wells Fargo's lien arising from its second deed of trust.

II.

We turn next to the issue of whether the Debtor filed her plan in good faith.² The

² In his brief, the Chapter 13 trustee refers to whether the Debtor filed her petition in good faith. The brief, however, cites Section 1325(a)(3) which requires that a plan must be filed in good. Further, the trustee's argument is based on this court's opinion in *Helton*, which concerns whether a plan is filed in good faith.

Chapter 13 trustee argues that the plan is not proposed in good faith. A bankruptcy court shall confirm a plan if, among other things, the plan has been proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1325(a)(3).

The Fourth Circuit Court of Appeals has provided guidance for trial courts in considering whether a plan is proposed in good faith.

While no precise definition can be sculpted to fit the term “good faith” for every Chapter 13 case, we think the generally accepted definition of “good faith” as used in Chapter 11 of the old Bankruptcy Act, 11 U.S.C. § 766(4) (1976) (repealed), provides the general parameters:

A comprehensive definition of good faith is not practical. Broadly speaking, the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the Chapter] in the proposal or plan....

9 Collier on Bankruptcy 9.20 at 319 (14th ed. 1978), cited in *In re Goeb*, 675 F.2d 1386, 1390 n. 9; *In re Rimgale*, 669 F.2d 426, 431 (7th Cir.1981); *In re Terry*, 630 F.2d 634, 635 n. 3 (8th Cir.1980).

Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982).

The determination of whether a Chapter 13 plan has been proposed in good faith is to be determined by considering all militating factors. *Deans*, 692 F.2d at 972. The totality of circumstance must be examined on a case by case basis. *Id.* Factors that are to be considered include, but are not limited to, the percentage of proposed repayment, the debtor's financial situation, the period of time payment will be made, the debtor's employment history and prospects, the nature and amount of unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing facts, and any unusual or exceptional problems facing the particular debtor. *Id.*

As with any totality-of-the-circumstances test, the inquiry does not consist of a simple

accounting. *Carolin Corp. v. Miller*, 886 F.2d 693, 701 (4th Cir. 1989). (“The dangers of overemphasis on particular indicia or patterns, of engaging in mere indicia-counting, and of forcing particular facts into previously identified patterns is obvious, and must be guarded against.”) No single factor will necessarily lead to a finding of bad faith. *Id.* Each factor is to be considered in light of its weight and relevance in the case under consideration. A factor that is determinative in one case may be of no consequence in another.

In *Helton*, this court focused on the following factors: (1) the debtor's past bankruptcy filing; (2) the nature and amount of unsecured claims; and (3) the percentage of proposed repayment. The Court concluded that sole purpose in that case was to avoid the liens of the three defendants that could not be avoided in the debtor's Chapter 7 case.

There are, however, important facts present in the current case that were absent in *Helton*. In this case, Wells Fargo, the creditor holding the lien, has consented to the entry of a judgment avoiding its lien that arises under the second deed of trust. This decision follows three failed attempts to auction off the collateral Real Property and an agreement between the parties resulting in a significant modification of Wells Fargo's first deed of trust.

In this case, the filing of the petition and the filing of the Plan do not constitute bad faith because the Debtor has not, under the singular circumstances of the case, forced any creditor to accept a modification of its rights. Rather, the Plan only modifies the claim of Wells Fargo and Wells Fargo has agreed to that modification. Accordingly, the Debtor has not abused the provisions, purpose, or spirit of Chapter 13 in the proposed Plan.

Conclusion

The Debtor's proposed judgment shall be entered avoiding the Wells Fargo's lien under

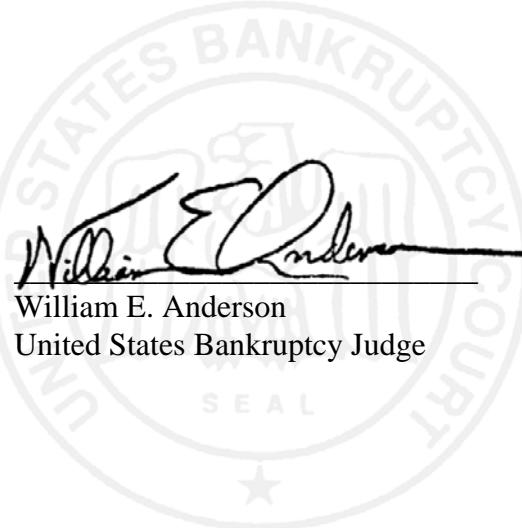
its second deed of trust.

Further, an order shall be entered confirming the Debtor's Chapter 13 Plan.

Upon entry of this memorandum the Clerk shall forward a copy to Larry L. Miller, Esq.,

Wells Fargo Home Mortgage, and the Chapter 13 trustee.

Entered on this 11th day of October, 2012.



The seal of the United States Bankruptcy Court is a circular emblem. It features the words "UNITED STATES BANKRUPTCY COURT" around the perimeter. In the center is a shield with scales and a sword, symbolizing justice and law. Below the shield is the word "SEAL".

William E. Anderson
William E. Anderson
United States Bankruptcy Judge